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NATURAL PRIVATE LAW

The article presents the comprehensive analysis on the issues of historical roots, core meaning, and constitutive elements of natural private law. The underlying principles of natural private law development are studied and illustrated. The interrelationship of modern international law and private law, civil law is covered in the article. Particular attention is paid to the different approaches and interpretations (in particular, social-biological and teleological) of both natural and private law definition. Overall, the keynote of the article is explanation and reasoning of dialectic substance of natural private law.

History knows numerous examples of situations where representatives of various peoples, cultures and civilizations, without knowing each other's languages and without having the least idea of each other's legal system, nonetheless concluded various types of transactions, specifically transactions for purchase and sale of goods.

These facts, in and of themselves, represent an amazing and truly interesting phenomenon from the point of view of law since one finds the substance and the nature of law as a universal phenomenon of social reality in them.

Let us imagine a simple situation: a citizen of some European country, while living on an island, uses sign language to conclude a sales contract with a member of the native population.

Here, we are immediately faced with a number of questions: 1. How could this transaction ever take place if the counterparts were not aware of each other's laws? 2. What legal norms govern this deal? 3. What guarantees are there that the terms of this deal will be observed?

However, the very fact that this transaction was actually concluded is an unqualified testament to the existence of some sort of self-evident principles or laws that have such common and universal characteristics that they could be termed peculiar to the very depths of man's nature. Further, this law is obviously not positivist because it does not stem from the will of the state and is not clothed in the mantle of its authority.

We are definitely talking about natural law which is so deeply rooted in man's nature and the subconscious that it may even be considered instinctive.

When concluding the given transaction, counterparts are unconsciously guided by the following principles: 1) first of all, they see each other as subjects of some sort of universal law, the existence of which is understood by them more on an intuitive rather than rational level;

2) they recognize property rights for the objects that they own; 3) they realize that fairness demands that the transfer of these objects is carried out not through violence, but through mutual acquiescence, i.e. through an agreement; 4) the actors promise to abide by this agreement in good faith; 5) the agreement must be concluded in good faith, i.e. it must not be the result of force or deception

The agreement is based on the mutual understanding and trust of the two sides. By concluding the agreement, the two sides consider themselves free and equal.

Therefore, the guarantee that the agreement will be observed is the mutual understanding and trust of the two sides.

In analyzing this case, we inevitably come to the conclusion that the transaction has a hermeneutic subbasis, since it is only possible when the two sides possess a mutual understanding that forms the foundation for the relationships of the two sides. Mutual understanding thus represents the basis of understanding and correct interpretation. It exists when the two sides perceive each other as equals, specifically as «one's other» I. Mutual understanding is the foundation of natural law, and this means that natural law has hermeneutic roots.

This mutual understanding is formed in areas where two sides' beliefs about each other intersect. The basis of mutual understanding is the sense of belonging to humankind. The logical question that follows then is about the founding principle of natural law.

According to the theory of academician V.I. Vernadsky, the principle of the unity of all peoples, i.e. the biological unity and equality of all people is a law of nature.[1] It is the main principle of natural law, its *Grundnorm*. The principle of unity and equality of all people is the starting principle of law and also its endpoint. Obstacles to implementing it are national laws which must be overcome through international, cosmopolitan law.

It is a known fact that the school of natural law has become the first scientific-theoretical school of civil law (the science of private law), and is most clearly expressed by Roman private law. Later, the concept of natural private law became embodied in the idea of natural, inalienable rights of man. As elucidated by the Russian civil law scholar Professor Spektorsky in his Saratov report (1911): «The system of private law is the system of Roman law, which already by the time of the classical men of law had been brought to such perfection that they saw in it the logic of law in general and even the logic of nature itself. Finally, the philosophy

[1] See: Vernadsky, V. I. (1988) *Naturalist's Philosophical Thoughts.* M., 503-512.

of 17th and especially that of the 18th century put this system onto a pedestal of natural, eternal and unchanging rights of man and citizen.»

Another Russian civil law scholar, Prof. V. I. Sinaisky had a similar view, which also stressed close ties between natural private law and the fate of the Roman law. According to Sinaisky, «Created by the Antiquity, this law (i.e. Roman law – A. M.) became a heritage of all new peoples, came to form the basis of modern civil law. An explanation for this phenomenon may be the fact that Roman law, though unofficially (not so for Germany), replaced in fact common law for new peoples. For them, it became the «written natural law», «the theory of civil law»[1].

Therefore, natural law, as represented by Roman private (civil) law was originally: first, natural law (jus naturale); second, common, i.e., universal law for European peoples who were creating these peoples' law continuity (jus commune europe); third, highest expression of legal logic based on rational principles (ratio scripta).

A historical basis of private law was not the will of the lawmaker; it was the sacral nature of ancestors' customs (mores maiorum). «Those were codes of behavior handed down from father to son in full belief that they are necessary and required since they were based on godly will and since ancestors who had observed them, themselves became godly creatures upon dying.»[2] In other words, private law grew out of ideational, godly law (jus sacrum), and its further development followed the path of secularization.

Viewed under this angle, the history of private law and its institutions, and, first and foremost, of the history of ownership right development, may be presented as history of relentless desacralization, disintegration and atomization. Using its logical tools, the positive science of private law did the same thing with it as science did with the concept of matter, which was first understood by humans as a unified and live substance, to be separated later into an infinite multitude of infinitesimally divisible units. If the school of natural law saw private law as living teleological unity, not reduced to a simple sum of the norms making it up, then positivism created an impression of private law as a lifeless, deadening system of formal logical schemes and operations.

It is worth noting that the emergence of private law historically preceded the rise of positive law and public law since it did not ensue from the will of the state. In essence, natural private law was synchretic by nature, and it gave rise to other branches of law, including civil and trade

[1] Sinaisky, V. I. (2002) *Russian Civil Law.* M., 45-46.
[2] Cesare, S. (2002) *Course on Roman Private Law.* M., 23.

law, in addition to the law of peoples. In this respect, modern international law borrowed much from civil law, especially in terms of legal tools, as private and international law are akin in their typological similarity, a similarity which is associated with the decentralized nature of the mechanism of legal governance, and with the method of coordination which forms the basis of both legal systems. Therefore it is not an accident that many founders of the international law were civil law scholars (for example, Gentili).

What is natural law?

Since law lies at the basis of a living human society, of understanding the nature of natural law, it is necessary to start by splitting human unions into natural and artificial ones. «What is the difference between a natural and an artificial union? How does a natural union start? –Russian historian, V. O. Klyuchevsky asks, and immediately provides a response, -– Instinctively, thanks to unconscious drives; this is an accidental union, it is formed without thoughts about the goal, it does not see its consequences and only realizes what its goal is after it is already formed. On the contrary, an artificial union begins when it becomes present in the consciousness. A natural union's goal appears before the union is formed, an artificial union's goal precedes this formation.»[1] In other words, natural unions (for example, family, clan, tribe) are built upon instincts, unconscious stimuli, artificial unions (private unions and the state) – upon goals, i.e., conscious drives introduced into coexistence by humans themselves.

This means that natural law may have two interpretations: first, as social-biological norms arising out of an instinct lying at the basis of natural alliances; second, from a teleological viewpoint, i.e. as a sort of ideal goal (for example, fairness), for which artificial alliance is striving, and to which the laws of this alliance must conform.

Teleological aspect of private law was also stressed by the outstanding Russian civil law scholar, I. A. Pokrovsky, who believed that law is a phenomenon of dual nature. «On the one hand, writes Pokrovsky in his work, *Natural and Legal Trends in the History of Civil Law*, there is in it a fact of reality, a power which … governs public relationships. On the other hand, law standards are a means to achieving social goals when striving to achieve a «social ideal». Our attitude toward law conforms then to this dual nature of law. On the one hand, law is presented to our consciousness as a phenomenon of the «real world», and we are striving to understand it in incarnation (dogmatically and historically). On the

[1] Klyuchevsky, V. O. (1989) Works: Nine Volumes. *Volume VI. Special courses*. M., 13.

other hand, we cannot but assess it from the point of view of the social goals that it serves…»[1]

Now, Pokrovsky suggests looking for criteria for evaluating law in «general views on what is proper», which in turn are determined by the «general views on the world, man and society», i.e. «a common world view».[2]

Let us note in light of its teleological aspect, natural law (in terms of Max Weber's philosophy) is the reflection of the value and rational social action, an example of which would be the actions of people who, despite possible detriment to themselves, still put their beliefs about obligations, truth and fairness into practice. It is through this aspect of natural law that the latter constitutes the will for fairness (will to justice), as German law philosopher, Gustav Radbruch, would say.

To summarize, let us stress that natural private law is a natural combination of biological instinct (first and foremost, freedom instinct that academician I. P. Pavlov discussed, as well as group solidarity instinct), and rational ideal of fairness.

This is the exact combination that we believe constitutes the dialectic substance of natural private law and the source of its life force.

[1] Pokrovsky, I. A. (1909) *Natural and Law Trends Throughout the History of Civil Law.* St. Petersburg, 38–39.

[2] Same, 39–40.